No. 82-2047

In The

Supreme Court of the United States

October Term, 1983

LATIN BELLY, LIMITED and ISMAEL BETANCOURT,

Petitioners,

vs.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF AGRICULTURE, CAROL STEINBERGER and ELIZABETH HOLTZMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the failure of the petitioners and their counsel to permit discovery of records as sought constituted the "bad faith," "willfulness" and/or "gross negligence" necessary to support the dismissal of the petitioners' claims.

2. Whether the requisite "bad faith" can properly be inferred from petitioners' disclosing that some of the records sought do not exist after having objected to the requested discovery as unduly burdensome.

3. Whether the dismissal of petitioners' claims was so tainted with bias as to call for the intervention of this Court.

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UNITED STATES OF AMERICA, U.S.
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Latin Belly, Limited ("Latin Belly") and Ismael Betancourt ("Betancourt") hereby petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, enabling this Court to review the

judgment in Latin Belly, Limited and Ismael Betancourt v. United States of America, U.S. Department of Agriculture, Carol Steinberger and Elizabeth Holtzman, (C.A. 2, No. 82-6171) (decided March 15, 1983).

OPINIONS BELOW

The bench order of the United States District Court for the Southern District of New York granting respondents' motion to compel discovery is not officially reported and is reproduced as Appendix F to this petition. The memorandum endorsement of the District Court dismissing this action with prejudice is not officially reported and is reproduced as Appendix E. The memorandum endorsement of the District Court denying petitioners' motion for reconsideration and reargument of the dismissal is not officially reported and is reproduced as Appendix D. The judgment of the District Court is not officially reported and is reproduced as Appendix C. The opinion and judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the District Court is not officially reported and is reproduced as Appendix B. The judgment of the Court of Appeals denying the

petitioners' petition for rehearing is not officially reported and is reproduced as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit affirming the judgment of the District Court for the Southern District of New York was rendered on January 28, 1983 (Appendix B) and entered on that date. The judgment of the Court of Appeals denying the petitioners' petition for rehearing was rendered on March 15, 1983 (Appendix A). This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reprinted in Appendix G.

STATEMENT OF THE CASE

Petitioners Latin Belly, a food supplier, and Betancourt, its president and sole shareholder, sued for damages resulting from defendant United States Department of Agriculture's revocation, at the direction of respondent Elizabeth Holtzman and without any administrative hearing, of Latin Belly's authorization to bid on contracts for the 1978 summer lunch program.* The basis for federal jurisdiction in the court of first instance was 28 U.S.C. Sections 1331, 1346(b) and 2671 et. seq., and 42 U.S.C. Sections 1761, 1983 and 2000d.

On October 14, 1981 respondents sought discovery under Fed. R. Civ. P. 34 of, inter alia, all of Latin Belly's corporate minutes, books, financial records, checkbooks, cash receipts, journals, federal, state and local tax returns, together with all documents relating to some 14 other persons and entities

* Myers & Myers v. U.S. Postal Service, 527 F.2d 1252 (2d Cir. 1975) establishes the merit of this claim.

including the "Puerto Rican Day Parade and any stockholder, partner, officer, director or employee thereof." Each of these extensive requests specified the time period from January 1, 1974 to present. On November 16, 1981 the petitioners responded by objecting to many of the requests as burdensome and by indicating their willingness to comply with the other requests. On April 26, 1982 Judge Brieant of the District Court ordered petitioners to produce all the documents requested including tax returns "for a period of three years prior to 1979 to and including the present date," and warned petitioners that he would dismiss the action "if there is willful noncompliance or any gross negligence in complying...." (Appendix F)

On June 7, 1982 Judge Brieant dismissed the action with prejudice, without a hearing and before receiving petitioners' response to respondents' letter complaining of petitioners' failure to provide certain

documents (Appendix E). In support of petitioners' motion to reargue, Betancourt explained that nothing was deliberately withheld and that while certain of the documents sought did not exist and others had been lost or discarded over the years, all documents in his possession or control were turned over except for check book stubs and a journal containing information which had already been provided in the form of cancelled checks. Petitioners' counsel explained that he did not turn over post-1978 tax returns in his possession because he inadvertently misread Judge Brieant's bench order to require only those returns for 1976 through 1978, the year the relevant events occurred. Judge Brieant denied the motion to reargue, assuming without reason that petitioners' lawsuit is nothing more than "political harassment" "Appendix D), and the Court of Appeals affirmed (Appendices A and B).

REASONS FOR GRANTING THE WRIT

The decision below, in affirming a lower court decision which is tainted with bias and in attributing "bad faith" to the petitioners because they objected to discovery as unduly burdensome before disclosing that some of the records sought do not exist, sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I

THE CIRCUMSTANCES DO NOT SUPPORT DISMISSAL OF PETITIONERS' CLAIMS

The worst that could be said is that petitioner Betancourt made an innocent mistake in failing to turn over the checkbook stubs and journal because the information therein was provided in the many cancelled checks which he did turn over, and that petitioners' counsel made an inadvertent error in misreading Judge Brieant's bench order as requiring tax returns for 1976 through 1978 only. There is no history of malfeasance or delay to support any other conclusion.

Neither the authorities cited by the Court of Appeals nor any other authorities support dismissal here. Thus, neither Betancourt's mistake nor his counsel's error even approaches the "flagrant bad faith" and "callous disregard" which led this Court to hold, in National Hockey League v. Metropol-

itan Hockey Club, Inc., 427 U.S. 639, 642 (1976) (per curiam), that dismissal was not an abuse of discretion. There the plaintiffs utterly failed, for a period of 17 months, to honor their promises and commitments to answer crucial interrogatories despite numerous extensions of time granted amid several admonitions by the District Court. In National Lawyers Guild v. Attorney General, 94 F.R.D. 600 (S.D.N.Y. 1982) the far more lenient sanction of assessing costs and attorneys fees against the offending party was imposed, even where the offending party, a government agency with vast resources and experience at its disposal, demonstrated "bad faith, willfulness and fault," Id., at 614, 615, in advancing a claim of inability to comply which was "swimming with red herrings," Id., at 606; making false statements to Judge Brieant; destroying material after plaintiffs requested it; "substitut(ing) their judgments for the court's and work(ing)

on discovery matters other than the ones ordered by the court," Id., at 614; and otherwise flaunting the discovery process. Even under these egregious circumstances, the court found that "...there is no present basis for imposing the harshest sanctions... (which)...would be out of proportion to the culpability of defendants and the prejudice suffered by plaintifss" Id., at 615. Finally, proof-preclusive sanctions tantamount to dismissal of one of the plaintiff's claims were applied in Cine Forty-Second St. Theatre v. Allied Artists, 602 F.2d 1062 (2d Cir. 1982) in light of plaintiff's "grossly negligent failure," Id., at 1066, to obey a series of discovery orders and warnings issued by the magistrate, as a result of which the litigation was "frozen...in the discovery phase for nearly four years." Id., at 1068.

The circumstances presented in the cases just discussed are of a wholly different order of magnitude than those pre-

sented here. The discovery requests here were arguably unduly burdensome. Petitioner Betancourt, not an attorney, complied with Judge Brieant's order to the extent possible except for one non-prejudicial omission which he did not advise counsel of. Petitioners' counsel was hardly guilty of any "flagrant negligence" or "series of episodes of nonfeasance which amounted, in sum, to a near total dereliction of professional responsibility" and which justifies the harsh sanction of dismissal. Cine Forty-Second St. Theatre, supra, at 1067, Affanato v. Merrill Bros., 547 F.2d 138 (1st Cir. 1977). Rather, counsel's failure was at the very worst an inadvertent misconstrual of an order, Cf. Edgar v. Slaughter, 548 F.2d 770, 773 (8th Cir. 1977).

II

THE COURT BELOW MISAPPREHENDED THE SIGNIFICANCE OF PETITIONERS' DISCLOSING THAT SOME OF THE RECORDS SOUGHT DO NOT EXIST AFTER THEY OBJECTED TO DISCOVERY AS UNDULY BURDENSOME

At oral argument, the Court of Appeals focussed its attention on the fact that petitioners did not ascertain that some of the records sought are non-existent, or reveal their non-existence, until after they objected to many of the discovery requests. Apparently the Court inferred from this sequence that petitioners and/or their counsel had acted with the "bad faith" which, in the absence of willfulness or gross negligence, is necessary to support the dismissal of petitioners' claims.

Far from evincing bad faith, the actions of petitioners and their counsel were reasonable and proper in every respect. To require that a party first search his records and ascertain their existence or non-existence before objecting to a Rule 34 discovery

request as unduly burdensome would undermine the authority conferred by the Federal Rules to oppose vexatious discovery. It would require at least partial submission to annoying, embarrassing, oppressive or unduly burdensome or expensive discovery requests as a precondition to objecting or seeking relief. It is also clear that where discovery sought under Rule 34 may be opposed either because the discovery request is overreaching or because some of the material sought does not exist, the ethically and jurisprudentially more significant grounds for objection are those relating to the impropriety of the discovery request. It is this category of objection which goes to the heart of litigants' responsibility to the courts and to each other under the Federal Rules to conduct themselves in an appropriate manner within boundaries which do not maliciously tax each others' resources or abuse the process of the Courts. A contrary conclusion would only

yield logical and jurisprudential incoherency.

Thus, for example, where, as here, a party is asked to produce all documents referring to the "Puerto Rican Day Parade and any stockholder, partner, officer, director or employee thereof," must he first determine the names of all such people during the seven years covered by the request and go through all of his files to determine whether any such material exists, before objecting to the request as overly broad, irrelevant and unduly burdensome? This is what the decision of the Court below would require. Yet, and this was petitioners' intent, the propriety of the request can and should be litigated independent of whether and to what extent such material exists. Even if this Court does not agree with petitioners on this matter of jurisprudence, it can by no means be said that petitioners' election to proceed in this manner in any way indicates bad faith, willful non-compliance or gross negligence.

In this case, the respondents responded to what they apparently took to be petitioners' effrontery in suing government agencies and public officials, by serving a discovery request which petitioners reasonably construed as unduly burdensome and insulting to them and to the District Court. Petitioners properly availed themselves of their right to object without first succumbing to the objectionable discovery request.

III

THE COURT OF APPEALS OVERLOOKED THE BIAS WHICH TAINTED THE DISTRICT COURT'S DISMISSAL OF THE ACTION

The tone of the District Court's order directing petitioners to comply with respondents' Rule 34 discovery request was, in a word, outrageous. Its substantive points were couched in a tirade against the petitioners. The order explicitly assumes that this litigation is nothing more than political harassment. It implicitly assumes that the petitioners are scoundrels and that their action is devoid of merit. Given the posture of the litigation at the time the District Court made this order, viz., pleadings had been exchanged but no evidence had been adduced, it is plain that these assumptions had no basis in fact. It is submitted that under these circumstances, dismissal of petitioners' action was so tainted by bias (or, at best, by the appearance of bias) that for

this reason alone the decision below cannot be permitted to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fifteenth day of March, one thousand nine hundred and eighty-three.

----------X

LATIN BELLY, LIMITED and
ISMAEL BETANCOURT,

Plaintiffs-Appellants,

v.

No. 82-6171

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF
AGRICULTURE, CAROL STEIN-
BERGER and ELIZABETH
HOLTZMAN,

Defendants-Appellees.

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants, Latin Belly, Limited and Ismael Betancourt.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the sugges-

tion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by

/s/
Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of January , one thousand nine hundred and eighty three.

P r e s e n t: HONORABLE J. EDWARD LUMBARD
HONORABLE WALTER R. MANSFIELD
HONORABLE THOMAS J. MESKILL,
Circuit Judges.

LATIN BELLY, LIMITED and ISMAEL BETANCOURT,

Plaintiffs-Appellants,

v.

Docket No. 82-6171

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF AGRICULTURE, CAROL STEINBERGER and ELIZABETH HOLTZMAN,

Defendents-Appellees.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Latin Belly, Limited and Ismael Betancourt appeal from a judgment of the United States District Court for the Southern District of New York, Brieant, J., dismissing their complaint pursuant to Fed. R. Civ. P.

37 for failure to provide requested discovery in accordance with the court's order. Appellants also appeal from the denial of their motion for reconsideration and reargument of the dismissal.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

The sole question on appeal is whether Judge Brieant abused his discretion in ordering dismissal of the complaint. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976) (per curiam) The provisions of Rule 37 vest the district court with broad discretion in the selection of sanctions for failure to provide discovery, including the ultimate penalty of dismissal. National Lawyers Guild v. Attorney General, 94 F.R.D. 600, 615 (S.D.N.Y. 1982). Dismissal can and should be employed when a party's noncompliance with a pre-trial order is willful, in bad faith, or due to fault. Cine Forty-Second St. Theatre v. Allied Artists, 602 F.2d 1062, 1066 (2d Cir. 1979). The district court erred in granting defendants' request for dismissal without giving the plaintiffs a hearing or an opportunity to respond to defendants' allegation of noncompliance with the discovery order. However, the court did review the plaintiffs' answering affidavit before denying their motion for reconsideration. Moreover, at oral argument the appellants' counsel stated that they do not seek a pre-dismissal hearing.

In light of the full record in this case, Judge Brieant's dismissal of the complaint in this issue was an appropriate sanction. Appellants were forewarned about the consequences of their failure to produce the

requested materials. They have not demonstrated good faith efforts to comply with the court order. Consequently, there is no showing here that the district court abused its discretion.

ON CONSIDERATION WHEREOF it is now hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is affirmed.

/s/
J. Edward Lumbard, U.S.C.J.

/s/
Walter R. Mansfield, U.S.C.J.

/s/
Thomas J. Meskill, U.S.C.J.

APPENDIX C

LATIN BELLY, LTD. and ISMAEL BETANCOURT	:	81 Civil 3847 (CLB)
Plaintiffs,	:	
-against-	:	JUDGMENT
UNITED STATES OF AMERICA, ET AL	:	
Defendants.	:	

Defendant(s) having moved for an order pursuant to Rule 37, Fed. R. of Civ. P., and the said motion having come before the Honorable Charles L. Brieant, United States District Judge, and the Court thereafter on June 7, 1982 having handed down its memorandum endorsement granting the said motion, as renewed and directing the Clerk to enter judgement, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed, with prejudice and without costs for failure to give discovery, neglect to prosecute and non-compliance with Court's order.

DATED: NEW YORK, N.Y.
June 8, 1982

/s/
Raymond F. Burghardt
Clerk

APPENDIX D

Endorsement

LATIN BELLY, LTD., et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.

81 Civ. 3847-CLB

The within motion returnable June 24, 1982 need not be answered. It is denied. This action was filed June 22, 1981, more than a year ago. Reference to the complaint and to the docket sheet which already comprises more than 40 filed documents, demonstrates clearly that this is essentially a law suit the purpose of which is political harassment.

The individual defendants were federal officials at the relevant times alleged in the complaint. Carol Steinberger was an employee of the United States Department of Agriculture, acting in 1978 as coordinator of the Summer Food Service Program for New York City, and defendant Elizabeth Holztman was then a member of Congress. It is alleged that Holtzman "caused to be published false statements" with respect to alleged collusive bidding and delivery of spoiled foods prepared under unsanitary conditions by plaintiffs; that the Congressman knew that these statements were false, and she caused them to be published with such knowledge, or with reckless disregard as to their truth or falsity. Failure to comply with various federal statutes and regulations is also alleged.

Plaintiffs seek Two Million Five Hundred Thousand ($2,500,000.00) Dollars in compensatory damages for their exclusion as providers of food, and a like amount in punitive damages, together also with the usual attorneys fees, costs and disbursements.

There is, of course, no question that persons situated as plaintiffs are, have the right to maintain such burdensome and harassing litigation. This Court must and does receive and consider such cases on the merits, or the lack of merit, with an open mind, as part of its judicial duties. Congress has the undoubted power to protect its members such as Ms. Holtzman from such litigation with its consequent waste of time, expense and interference with other efforts on their part. Also, it could protect the employees of the Executive Branch of Government. It has failed to do so.

This Court can, however, and should, insist that those who wish to impose on present or former officials and use the Court process for harassment and to recover punitive damages shall comply fully with its lawful pre-trial discovery directions. This the plaintiffs here did not do. They were expressly warned of the consequences. There is no reason why this Court should not keep its word and dismiss for an unexcused and wilful failure to give pre-trial discovery and get this case ready for trial.

It is noteworthy, perhaps, that there is no affidavit of merit submitted in connection of the motion. Perhaps this is because there is no merit. Less rigorous sanctions might be appropriate were we considering the meritorious case of an injured seaman or railroad worker threatened with loss of rights due to an attorney's failure to give discovery. The Court adheres to its prior determination.

So ordered.

/s/
Charles L. Brieant
U.S.D.J.

Dated: New York, NY
June 22, 1982

APPENDIX E

June 7, 1982

Motion as renewed is granted and this action is dismissed with prejudice and without costs for failure to give discovery, neglect to prosecute and non-compliance with Court's order. Clerk Shall enter judgment.

So ordered.

Charles L. Brieant,
U.S.D.J.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

LATIN BELLY, LTD., et ano., :

Plaintiff, :

-against- : 81 Civ. 3847

UNITED STATES OF AMERICA, et al., :

Defendant. :

---------- X

May 3, 1982
9:30 a.m.

BEFORE:

HON. CHARLES L. BRIEANT, JR.,
District Judge

APPEARANCES:

HARRY KRESKY, ESQ.,
Attorney for Plaintiff

JOHN LINDSEY, ESQ.
Attorney for Defendant Government

(Open court)

THE COURT: The record will indicate that the court has been holding a hearing on this motion which is a Rule 37 motion made by the defendants. Item two in the request for relief that all proceedings herein be stayed is denied.

As to item three, the court reserves decision pending compliance. If there is full compliance with the order about to be made, the court will not impose any costs or expenses or legal fees on the plaintiffs.

The court directs full compliance with the document discovery sought in the notice with the following exception:

The court will limit the scope of item five for a period of three years prior to 1978 to and including the present date.

The court will sign a protective order eliminating access to anything inspected by the defendants except solely for the purposes of this lawsuit and the related lawsuit in this courthouse which is being maintained by this plaintiff under docket number 80 Civ. 3387.

A protective order is to be submitted and to be performed in satisfaction of both attorneys by Thursday. The document inspection, if they are bulky, can be had at their actual location in the Bronx. Any xeroxed copies ordered with respect to any of the documents shall be prepared at the expense of the defendants.

Can I set an outside date which will be agreeable to both counsel for complete compliance to discovery?

MR. KRESKY: If we could set Tuesday of next week, your Honor, just because it is a scheduling issue.

THE COURT: The court requires total compliance and good faith within twenty days.

The court indicates right now if there is any willful noncompliance or any gross negligence in complying, the court will dismiss this action with prejudice and with costs on application of any defendant who feels aggrieved thereby.

Do we have a date for you to come back and see me when you're supposed to be ready?

MR. LINDSEY: No, your Honor.

THE COURT: I will give you a date. When will you be ready for trial, Mr. Kresky?

MR. KRESKY: I would think some time in late June or early July, your Honor.

THE COURT: All right. I'll give you a final pretrial conference in September. We're not trying any civil cases in August. If you settle the case in the meantime, send me in a discontinuance.

All discovery is absolutely to be finished by that time. The court will have a final pretrial conference and you may be going to trial almost immediately after that date. September 2nd, 9:30.

MR. KRESKY: If I might raise one other matter.

I served a notice for a deposition of defendant Elizabeth Holtzman about a month

ago and Mr. Lindsey and I had been discussing the scheduling of it and I was preparing--

THE COURT: That must be done before September so that you have your minutes back from the court reporter. See if you can't--she holds a public office of some importance. See if you can't schedule a date that's convenient to her.

MR. KRESKY: I agreed to do it in her office as well.

MR. LINDSEY: It is also limited to two hours. The problem that I have since he thinks he may be dismissing the libel claim against her --

MR. KRESKY: It wasn't just a libel claim --

THE COURT: You can't address each other on the record.

MR. KRESKY: Her situation doesn't address the libel claim. It addresses other claims as well.

THE COURT: Why don't you get the consent to avoid the necessity of doing it. But if it isn't completed by September 2nd, you're not going to do it. If I can try this case on the 3rd, I will. I don't know how many criminal cases we will accumulate during the summer.

You are directed to comply with the court's oral directions.

(Record closed)

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.

(a) SCOPE. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) PROCEDURE. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the

reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) PERSONS NOT PARTIES. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions.

(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or

both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) FAILURE TO COMPLY WITH ORDER.

(1) *Sanctions by Court in District Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action

in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the

request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

[(e) SUBPOENA OF PERSON IN FOREIGN COUNTRY.] (Abrogated)

(f) (Repealed, eff. October 1, 1981)

(g) FAILURE TO PARTICIPATE IN THE FRAMING OF A DISCOVERY PLAN. If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.